In the
Supreme Court of the United States

October Term, 1978

No. 78-1487

FORD MOTOR CREDIT COMPANY, et al.,
PETITIONERS,

v.

DENNIS MILHOLLIN, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL CLIENTS COUNCIL, INC.,

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BRIEF AMICUS CURIAE OF NATIONAL CLIENTS COUNCIL, INC.,

Interest of Amicus Curiae

National Clients' Council, Inc., is a non-profit corporation representing low-income clients of publicly and privately-funded legal service organizations. Low-income clients

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* Although the case has been captioned as such, the proper spelling of Respondents' surname is "Millhollin."

from all regions of the United States elect the Board of Directors of National Clients Council, Inc., at least two-thirds of whom must be low-income persons eligible for legal representation by the legal services organizations. These low-income clients are directly and uniquely affected on a consistent and continuous basis by the operation and enforcement of the Truth in Lending Act and Regulation Z in general, and by the contractual acceleration clause in particular.

Express consent to file this brief *amicus curiae* has been given by all parties to this suit. The original letter from each counsel is filed herewith.

Statement of Facts

The issue in this case is whether Petitioner Ford Motor Credit Company (hereinafter FMCC) violated the Truth in Lending Act by failing to disclose in its consumer credit contracts with Respondents Mr. and Mrs. Milhollin and with Respondent Donna Eaton the full charges payable upon failure to make timely payment.

Under the contracts, Mr. and Mrs. Milhollin purchased a car and agreed to pay $85.68 on the 29th of each month and Donna Eaton agreed to pay $103.64 on the 9th of each month. Pet.App. 9, 65. If either failed to make payment FMCC could accelerate the maturity of the contract and demand a charge of immediate payment of the entire unpaid balance including unearned interest, up to $3,084.64 in Mr. and Mrs. Milhollin's case and up to $3,731.04 in Donna Eaton's case A. 10, 66. Or FMCC could instead demand payment of a delinquency charge of $4.93 under the Milhollin contract and $5.00 under Donna Eaton's contract for each unpaid installment. FMCC disclosed its right to demand the delinquency charge of up to $5 in large print on the front of the contract. A. 9, 65. FMCC put its right

to charge the unpaid balance in minute print on the back of the contract. A. 10, 66.

When Mr. and Mrs. Milhollin both became unemployed and missed two payments and when Donna Eaton missed a payment, FMCC accelerated the maturity of the contracts and without notice repossessed their cars which secured the credit contracts. A. 27. Although Mr. and Mrs. Milhollin offered to pay FMCC the $171.36 delinquency FMCC demanded in its post-repossession notice, FMCC refused to return the car unless Mr. and Mrs. Milhollin paid the full $2,440.42. A. 21. FMCC claims that it has a policy of rebating all unearned interest but $15, Petitioners' Brief at 6, and that $2,415.92 of that $2,440.42 represents the unpaid balance minus a full credit of unearned interest.[1] In fact, FMCC appears to have kept $28.01 in unearned interest, see Section IIB. Mr. and Mrs. Milhollin could not tender the full unpaid balance and their repossessed car was sold by FMCC.

Summary of the Argument

Section 128(a)(9) of the Truth in Lending Act and §226.8(b)(4) of Regulation Z both require the disclosure of "default, delinquency, and similar charges payable upon late payments." Ford Motor Credit Company claims the contractual right to impose four of these charges against the Milhollins and Eaton: immediate payment of the full unpaid balance; the contractual right to retain unearned finance charges, actually exercised in the Milhollins' case; a $15 acquisition charge; and a delinquency charge of up to $5. FMCC chose to disclose only its right to impose the least consequential $5 delinquency charge. It chose not to disclose the far more important rights to impose the other three charges. These three charges are payable upon acceleration for default occasioned by late payment and

[1] The remaining $24.50 is a repossession expense.

thus must be disclosed under the plain meaning of the Act and Regulation Z.

Disclosure of these default charges is necessary to further the fundamental Truth in Lending policy of informed use of credit. Since imposing immediate payment of the full unpaid balance is far from universal, but has a devastating impact when imposed, its disclosure allows consumers to shop for creditors who do not use the term, and to take that term into account when managing their credit affairs.

The Federal Reserve Board itself has offered no interpretation of §128(a)(9) or the identically worded §226.8(b)(4). The Board staff's opinions on disclosure of acceleratation and attendant charges deserve no weight because of their procedural and substantive deficiencies. Procedurally, these opinions were not approved by the Board and were made without any comment from creditors or consumers. Substantively they are not only internally inconsistent and confusing, but are contrary to the basic goal of the Act and Regulation of meaningful disclosure of important credit terms.

Argument

I. By Concealing a Critical Credit Term, Ford Motor Credit Company's Failure To Disclose All Charges Payable Upon Acceleration for Late Payment Violates the Truth in Lending Act's Most Basic Policy of Informing Consumers of the True Costs of Purchasing Credit.

As this Court has recognized in *Mourning* v. *Family Publications Service,* 411 U.S. 356, 363-64 (1973), Congress passed the Truth in Lending Act in 1968 in part to require meaningful disclosure of credit terms so that consumers

could make informed choices when purchasing credit. The acceleration clause is a critical term because the consequences to the consumer of its exercise are devastating. The major consequence of demanding payment of the unpaid balance is the immediate, unanticipated economic burden on the consumer. The typical consumer enters into a credit transaction expecting to, and able to, pay the full debt only by making the installment payments agreed upon over a stated period of time. But upon acceleration for untimely payment due to illness, unemployment and other crises beyond the consumer's control,[2] that expectation is suddenly thwarted; the consumer must pay not only the monthly installment but immediately all the remaining unpaid monthly installments. This unanticipated economic burden increases dramatically the likelihood of default judgment[3] and garnishment of wages. These lead in turn to even more drastic and far-reaching results—loss of job security, increased reliance on welfare assistance and new employment obstacles.[4] The consumer's inability to pay an accelerated debt results in a loss of credit standing. This loss of credit is especially harmful since two-thirds of all major durables acquired by middle and low-income consumers are purchased with credit[5] and seventy-five percent of low-income consumers use credit for at least some of their major purchases.[6]

The significant increase in a consumer's immediate out-

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[2] National Commission on Consumer Finance, Consumer Credit in the United States 43 (1972).

[3] D. Caplovitz, *The Poor Pay More* 161 (1967).

[4] The unfortunate results of wage garnishment and other creditor practices are documented in D. Caplovitz, *Consumers In Trouble* 271-289 (1974). Title II of the Consumer Credit Protection Act, "Restriction on Garnishment," was promulgated largely as a partial response to these facts. 15 U.S.C. § 1671 *et seq.*

[5] Note, *Consumer Legislation and the Poor,* 76 Yale L.J. 745, 761 (1967).

[6] D. Caplovitz, *The Poor Pay More* 100-101 (1967).

standing debt obligation caused by acceleration contributes also to the pressure to declare bankruptcy.[7] Bankruptcies in turn create a significant risk of loss to other creditors.

Because the consequences of acceleration are so serious, the risk should be taken consciously and not come as an unwelcome surprise as it did with Donna Eaton and Mr. and Mrs. Milhollin. Neither at the time the contracts were signed nor at any other time did FMCC disclose its right, upon acceleration for late payment, to impose upon Mr. and Mrs. Milhollin and Donna Eaton the immediate payment of the full unpaid balance, including unearned interest, and including a $15 charge. Instead, its alleged right to impose a $15 acquisition fee is nowhere set out, and the remaining right to demand immediate payment of the full unpaid balance was printed in minute print on the back of the contract. Only the inconsequential right to impose the charge of the lesser of $5 or 5% of the unpaid monthly installment was disclosed on the front of the contract.

Disclosure of all charges payable in the event of late payment and acceleration would further the fundamental Truth in Lending goal of the informed use of credit. Consumers will use the information when shopping for credit. The disclosure of an acceleration clause also enhances the informed use of credit after a credit agreement is signed. An accurate statement of the consequences of a late payment increases a consumer's opportunity to manage, plan and understand his credit affairs. This ability to avoid the consequences of uninformed use of credit is likely to benefit consumer and creditor alike, especially in times of financial strain.

Acceleration clauses are far from universal. The Report of the National Commission on Consumer Finance

[7] D. Caplovitz, 2 *Debtors In Default* 14-3 (1971). "[T]he greater the indebtedness of the debtor, as measured by the ratio of his monthly installment payments to his monthly income, the greater his likelihood of going bankrupt."

found that only 47% of the retailers used acceleration clauses in their installment credit contracts and 68% in their open-end credit contracts. Even finance companies, of which FMCC is one, are not unanimous in the use of acceleration clauses; 5% of all finance companies do not use acceleration clauses in indirect automobile loans, 10% do not use them for personal loans, and 7% do not use them for indirect loans for other consumer goods.[8] Disclosure of the critical acceleration clause will produce consumer awareness, just as disclosure of the Annual Percentage Rate resulted in a substantial increase in consumer awareness of Annual Percentage Rates.[9] While not every consumer will shop to avoid this onerous credit term, awareness of the term's significance by only 10% of the relevant population is considered sufficient to produce an informed marketplace and competition between creditors over that term.[10]

FMCC and its amici curiae, particularly Consumer Bankers Association, complain that acceleration is an insignificant technical term which, like all technical terms,

[8] D. Greer, *Creditors Remedies and Contract Provisions* 31-35 (National Commission on Consumer Finance, Technical Studies Vol. V 1973). The percentages may reflect a margin of error due to a small survey non-response rate. *Id.* at 37.

[9] National Commission on Consumer Finance, Consumer Credit in the United States 176 (1972).

[10] *Id.* The NCCF Report acknowledges the effect on the market of those persons who will be reached by Truth in Lending:

> In terms of fostering viable rate competition among credit grantors, these levels of awareness produced by [Truth in Lending] are probably adequate. Not all consumers need be aware of the [Annual Percentage Rate] or shop for credit to bring about effective price competition. A significant marginal group of consumers who are aware and do shop is sufficient to "police" the market. As Senator Douglas pointed out in the House hearings on H.R. 11601:
>
> > . . . it is the undecided minority that influences the sellers. So you need only have, in my judgment, about 10 percent cost conscious and they will get the firms competing for that 10 percent.

should not be disclosed. Litigation over disclosure of technical terms, they claim, has substantially increased the federal court caseload and the cost of creditor compliance with the Truth in Lending Act. Consumer Bankers Association Brief at 19. That claim is simply not true. Truth in Lending cases represent little more than one percent of all cases filed between 1972 and 1978[11] or less than 5 cases per federal district judge per year. Nor is their claim relevant. *Reiter* v. *Sonotone Corp.,* 47 U.S.L.W. 4672, 4675 (June 11, 1979). Moreover, what litigation exists is a reflection of the sizeable amount of creditor non-compliance, even ten years after the enactment of the Act.[12] One example of this creditor non-compliance is FMCC's decision to litigate this issue, rather than disclose acceleration.

This litigation could have been avoided, if FMCC had

[11] The following table shows the number of consumer protection cases filed compared with the total number of cases filed for the period 1972-1978:

	Total Cases Filed	*Consumer Credit Cases Filed*	*% Consumer/ Total*
1972	96,173	415	0.43%
1973	98,560	743	0.75%
1974	103,530	1,682	1.62%
1975	117,320	2,237	1.91%
1976	130,597	2,147	1.64%
1977	130,567	2,183	1.67%
1978	138,770	1,957	1.41%
Totals	815,517	11,364	1.39%

The Annual Report of the Director of the Administrative Office of the United States Courts, 191, 220-221 (1975) and the Annual Report of the Director of the Administrative Office of the United States Courts, 177, 210, 211 (1978).

Included in the Truth in Lending statistics are all Consumer Credit Protection Act cases, including Equal Credit Opportunity, Fair Credit Reporting, Fair Credit Billing, and Collection Practices, as well as odometer fraud cases filed under the Motor Vehicle Information and Cost Savings Act and cases filed under the Interstate Land Sales Full Disclosure Act.

[12] Board of Governors of the Federal Reserve System, Truth in Lending Annual Report to Congress 11 (1978).

disclosed a simple explanation of its right of acceleration and the method of rebating unearned interest. A disclosure such as the following would inform consumers of the effect of acceleration:

> If you (the buyer) pay any installment late or otherwise break this agreement, I (the seller) can demand the immediate payment of the entire amount of money you still owe me under this contract. You will receive a credit for unearned FINANCE CHARGES, computed by the sum of the digits method after first deducting $15.00.

It is curious that FMCC did not attempt to make any simple disclosure, especially since the only law at the time of the making of the contracts was clear; the court in *Garza* v. *Chicago Health Clubs, Inc.,* 347 F.Supp. 955 (N.D. Ill. 1972) required disclosure of the acceleration clause fully two years prior to the date of the contracts in this case. Other creditors chose to disclose the right and consequences of acceleration. See Appendix A. FMCC could have done the same.

II. Ford Motor Credit Company Violated the Truth in Lending Act §128(a)(9) and Regulation Z §226.8 (b)(4) by Failing To Disclose All Charges Payable in the Event of Late Payment.

The Truth in Lending Act §128(a)(9) requires the disclosure of "default, delinquency or similar charges payable in the event of late payment" in closed-end credit transactions. Regulation Z §226.8(b)(4) repeats this language verbatim. FMCC violated these provisions by failing to disclose three important charges which it imposed upon late payment. First, it failed to disclose that the entire unpaid balance is payable if FMCC accelerates because of late payment. Second, it failed to disclose its

contractual right to retain unearned interest as a default charge, a right exercised in the Milhollins' case in the amount of a $28.01 charge. Third, FMCC failed to disclose its imposition of a $15 acquisition fee as a charge for late payment. These charges were imposed on the Milhollins and Eaton by FMCC without any advance warning and solely because they defaulted on their obligations by failing to make timely payment. Disclosure of these charges is mandated by the plain language of the Act and Regulation Z.

A. *Requiring Immediate Payment of the Full Unpaid Balance Upon Acceleration for Late Payment Is a Default or Similar Charge Payable in the Event of Late Payment.*

1. *The Plain Meaning of "Default Charge" Includes the Accelerated Unpaid Balance Due Upon Default.*

"Default charge," "delinquency charge" and "similar charge" are nowhere defined in the Truth in Lending Act or Regulation Z. In the absence of any such definition, rules of statutory construction provide that words should be given their ordinary, common meaning. 2A Sutherland, *Statutory Construction* §47.27 (1973, Supp. 1979). The ordinary meaning of "charge" is "pecuniary liability," Webster's *Third New International Dictionary* 377 (Unabridged 1971), and thus the ordinary meaning of a "default charge" is a pecuniary liability assessed upon or due to default.

This definition of default charge is sensible, simple and clear. More importantly, it is fully consistent with Truth in Lending's basic policy that the consumer be given all significant credit information so that he can compare more readily the options offered him by creditors and know with a certainty his total obligations. Thus, §128(a)(9) of the

Act and §226.8(b)(4) of the Regulation require FMCC to disclose the pecuniary liabilities it assesses upon default, including immediate payment of the unpaid balance, not merely to disclose the inconsequential penalty of $5 or 5% of the unpaid monthly installment.

FMCC attempts to circumvent this plain and clear meaning of the statute and regulation by arguing that the term "default charge" in §128(a)(9) of the Truth in Lending Act should not be given its ordinary meaning, but rather a meaning allegedly unique to the consumer credit industry. Petitioners' Brief at 34. In the consumer credit industry, according to FMCC, "default charges" describe only the compensation a creditor receives on a precomputed contract for the debtor's delay in making timely installment payments, Petitioner's Brief at 34-35, that is, the type of charge described in Paragraph 12 of FMCC's contract, the lesser of $5 or 5% of the unpaid monthly installment.

FMCC's authority for the allegedly technical meaning of "default charge" is weak and inconclusive. The pages in Curran, *Trends in Consumer Credit Legislation* 1965) cited by FMCC, Petitioners' Brief at 36, do not even use the words "default charges" and define compensation for the consumer's delay as a "delinquency charge." FMCC also misquotes Consumer Credit Guide in the same fashion. *Compare* Petitioner's Brief at 34-35 *with* Consumer Credit Guide ¶4230.

Moreover, *Corning Glass Works* v. *Brennan,* 417 U.S. 188 (1974), upon which FMCC relies heavily, makes clear that statutory terms must be interpreted in accordance with their ordinary meaning unless there is specific evidence both that the term actually is used differently by the industry and that Congress intended to adopt such different usage. FMCC offers no such evidence on legislative history and indeed, there is none.

Ironically, FMCC's proffered definition of "default charge" is itself contrary to the usage in the industry, and renders superfluous the Act's use of the words "default charge." FMCC's suggested definition of "default charge"—compensation for the consumer's delay in making timely payment—is the classic definition of "delinquency charges," not default charges, 1 Cons. Cred. Guide, ¶4230. To define "default charges" as "delinquency charges" makes "default charge" redundant, violating the rule of statutory construction that courts are to construe words so as to give meaning to each. 2A Sutherland, *Statutory Construction* §46.06. If Congress had intended "default charge" as FMCC argues, it simply would have omitted the term entirely from the Act. The Federal Reserve Board staff recognized this in construing "default charges" broadly to include any charge which is due by virtue of default, including attorneys' fees and foreclosure costs. Federal Reserve Board Official Staff Interpretation FC-0054 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552 (April 4, 1977).

In arguing that "default charge" ought to be given a narrow interpretation, FMCC and its *amici* are forced to rely solely on the revision of §128(a)(9) of the Act which in its draft form required disclosure of the "terms applicable in the event of advanced or delayed payment . . . ," S. 5, 90th Cong., 1st Sess. §4(a), 113 Cong. Rec. 14691 (1967). FMCC argues that the change from "terms" to "default, delinquency, and similar charges" indicates an intent to give "default charges" a narrow meaning. However, in commenting on this revision, the Senate Committee Report noted that "[The final] language is similar to the original S. 5 except that the requirement to indicate the terms applicable in the event of advanced payment is deleted." S. Rep. No. 392, 90th Cong., 1st Sess. 15 (1967). If anything is to be read from this change in language it is a congressional intent to maintain a broad definition

of "default charges," not a narrow meaning as FMCC suggests.

Moreover, this Court previously has found a specific remedial congressional intent enunciated in the Truth in Lending Act which militates against restrictive interpretation of its terms. *Mourning* v. *Family Publications Services,* 411 U.S. 356, 364 (1973). Because of the remedial nature of the statute, rather than construing it in narrow and technical terms, a court is "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin* v. *Knight,* 389 U.S. 332, 336 (1967); *Abbott Laboratories* v. *Portland Retail Druggists Association, Inc.,* 425 U.S. 1, 12 (1976); *SEC* v. *Capital Gains Research Bureau,* 375 U.S. 180, 195 (1963). Thus, "default charges" should not be given a narrow meaning which contradicts its sense in ordinary English.

2. *Nothing in the Act, Legislative History, or Regulation Z in any Way Suggests that "Default Charge" in § 128(a)(9) and §226.8(b)(4) Means Only "Extra Charges" Beyond the Total of Payments.*

The Truth in Lending Act and Regulation Z are based on a scheme of disclosure of the significant indices of purchasing credit. They require disclosure of not only the total amount of money the consumer must pay, but also the timing of the payments. In that regard the Act and Regulation Z require disclosure of the scheduling of repayment, including due dates, the periodic payment amounts, downpayments, balloon payments, and pick-up payments. Regulation Z §226.8(b)(3); Federal Reserve Board Interpretation §226.504.

Nonetheless, FMCC would have this Court interpret "default charges" under the Act, §128(a)(9) and Regulation Z §226.8(b)(4) as applying narrowly to only "extra

charges," that is, charges in excess of the total amount due under the scheduled periodic installments. According to FMCC, since the unpaid balance is the total amount due, it is not an "extra charge" assessed for default and therefore need not be disclosed. By this claim, FMCC fundamentally misconstrues the Act and Regulation Z by urging that only the total amount the consumer must pay, and not the timing of that payment, must be disclosed.

Moreover, FMCC cites no authority for this novel argument, and indeed the legislative history provides no support whatsoever. None of the Committee Reports states or in any way implies that "charges payable in the event of late payments" are limited to sums in excess of the amount ordinarily due. H.R. Rep. No. 1040, 90 Cong., 1st Sess. (1957); S. Rep. 392, 90th Cong., 1st Sess. (1967); Conference Rep. No. 1397, 90th Cong., 2d Sess. (1968).

Indeed, FMCC's argument reduces itself to absurdity quickly. Under FMCC's proffered interpretation, even the unearned finance charge is not a charge under Sec. 128 (a)(9) of the Act and Sec. 226.8(b)(4) of Regulation Z, as it clearly is an amount due under the original term of the contract. Yet the authorities are virtually unanimous that unearned interest is a "default" charge.[13]

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[13] *McDaniel* v. *Fulton National Bank,* 571 F.2d 948, *aff'd on rehearing,* 576 F.2d 1156 (5th Cir. 1978); *Griffith* v. *Superior Ford,* 577 F.2d 455 (8th Cir. 1978); *Johnson* v. *McCracken-Sturman Ford, Inc.,* 527 F.2d 257 (3rd Cir. 1975); *Tarplain* v. *Baker Ford, Inc.,* 466 F.Supp. 1340 (D.R.I. 1979); *Price* v. *Franklin Investment Co.,* 574 F.2d 594 (D.C. Cir. 1978); *see Glover* v. *Doe Valley Development Corp.,* 408 F.Supp. 699 (W.D. Ky. 1975); *Franklin* v. *First Money, Inc.,* 414 F.Supp. 21 (E.D. La. 1976); *Paer* v. *Aetna Finance Company,* 5 Consumer Credit Guide (CCH) ¶ 98,353 (N.D. Ga. 1976). Of the Circuit Courts to address this issue, only the Tenth Circuit, in *Begay* v. *Ziems Motor Co.,* 550 F.2d 1244, 1248 (10th Cir. 1979) suggests that unearned interest is not a charge, finding support for its view in the failure of the Federal Reserve Board staff to issue any official regulation on the subject. However, after the decision in *Begay,* the Federal Reserve Board staff issued Official Staff Interpretation FC-0054 (April 4, 1977) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, 42 Fed. Reg. 18056 (1977). FC-0054 describes the retention of unearned interest as a charge.

3. *FMCC's Own Contractual Language Defines the Accelerated Unpaid Balance as a Default Charge Payable in the Event of Late Payment.*

FMCC next argues that even if the unpaid balance is a default charge, nevertheless it is not "payable in the event of late payments" and thus need not be disclosed under the Act §128(a)(9) and Regulation Z §226.8(b)(4). But the very language in the FMCC contracts compels the opposite conclusion, that the unpaid balance *is* payable in the event of late payment. Paragraph 19 of FMCC's contracts grants FMCC the right to accelerate the unpaid balance in the event of "default."[14] And "default" is used in Paragraph 12 of FMCC's contracts to mean late payments.[15]

In fact, FMCC utilized Paragraph 12 to impose a charge of 5% of the monthly installment when the Milhollins were in default by paying late. A. 18. FMCC had authority pursuant to its own contractual language to impose that charge only if "default" in Paragraph 12 includes "late payments." Since FMCC actually interpreted "default" in Paragraph 12 of its own contract in this fashion, "default" in Paragraph 19 of the contract must also encompass "late payments."

FMCC also appears to argue that acceleration is available and the demand for the unpaid balance can be made only upon a total failure to make any payment. Petitioners' Brief at 35. FMCC argues that when a payment is

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[14] Paragraph 19 reads in relevant part:

> In the event Buyer defaults in any payment . . . Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable . . . . A. 10, 66.

[15] Paragraph 12 states:

> Delinquency Charges. Buyer hereby agrees to pay a delinquency charge on each installment in default for more than 10 days in the amount of 5% thereof or $5, whichever is less, plus such expenses incurred by the Seller in effecting collection hereunder as may be allowed by law. A. 9, 65.

actually made, even though late, FMCC does not have grounds for acceleration. Not only is this construction entirely inconsistent with FMCC's own use of "default" in both Paragraph 12 and Paragraph 19 of its contracts, but FMCC stretches credulity to suggest that it drafted its contracts to intentionally deprive itself of the right to accelerate the maturity where a debtor too often pays an installment twenty to thirty days or more after the due date.

This construction of acceleration clauses that FMCC urges upon the Court is inconsistent with the standard construction that the creditor has the right to accelerate for any default, that is "breach of some condition of the contract by the debtor." Black's *Law Dictionary* 26 (4th Ed. 1968). Since the Milhollins' contract requires payment of a specific sum on the 29th of each month, and Eaton's contract on the ninth of each month, and both specify that "Time is of the essence," A. 10, 66, failure to pay on that date gives FMCC ground to declare the consumer in default and accelerate. In fact, the National Commission on Consumer Finance recommended that "default" should be left for definition by the parties but "should result only from the breach of major contract provisions, such as failure to make timely payments of interest or principal . . . ." NCCF, *Consumer Credit in the United States* 25 (1972). Similarly, the Federal Trade Commission staff considered the broad definition of default as including untimely payment to be so prevalent by creditors that it urged its prohibition. That staff noted:

> Abuses associated with acceleration follow from the broad definition of default which triggers the acceleration right. *Default may be considered to have occurred* [*and thus be permissible*] *if the debtor is one day late making an installment.* . . . FTC Staff Report, *Trade Regulation Rule: Creditor Remedies* 600 (1974). (emphasis supplied)

The Uniform Commercial Code, including Oregon's version which governs the Milhollin and Eaton contracts, permits any ground for default and acceleration upon default as long as the creditor in good faith believes that the prospect of payment is impaired. UCC §1-208 and Official Comments.

Furthermore, as discussed more fully in Section IIA 4 of this Brief, the contracts in the legislative records of the Act do not limit the use of acceleration to non-payment of the installment. They allow the creditor to accelerate when the installment is late.

4. *The Actual Credit Contracts Before Congress During Consideration of the Act Defined "Default Charge" To Include Acceleration of the Unpaid Balance in the Event of Late Payment.*

FMCC argues that Regulation Z §226.8(b)(4) does not require the disclosure of the unpaid balance owing upon acceleration because if Congress had intended to require the disclosure of acceleration it would have said so explicitly. This argument begs the real question. The term "default charge" *did* describe the balance owing upon acceleration, as that term was used in the contracts presented during legislative testimony on the Truth in Lending Act. Many contracts in the legislative record of the Truth in Lending Act made acceleration an event of late payment,[16] other contracts made acceleration a consequence

[16] Of the twenty-four legible, complete and nonduplicative contracts in the legislative record of the Act, eleven permit acceleration for late payment. They are found at: Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960) at 264, 266, 778; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 1740, 87th Cong., 2d Sess. (1962) at 27, 297; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 750, 88th Cong., 1st and 2d Sess. (1963-1964) at 169, 170-171, 173-174, 212-213, 497, 1153.

of default.[17] Few contracts provided for the payment of a delinquency charge.[18] Thus, the right to accelerate and charge the consumer with immediate payment of the unpaid balance upon untimely payment was more widely retained by the creditors whose contracts were put into the record than was the right to impose a delinquency charge. Indeed, because of its frequent appearance in the contracts, prevalent use and devastating effect on consumers, this Court justifiably may assume that Congress intended its disclosure absent strong evidence to the contrary.

Moreover, it would be odd if Congress were to view the right to impose a small compensatory sum as sufficiently important to require its disclosure and yet not view the right to impose a much larger amount of money, the accelerated unpaid balance, as not requiring disclosure.

[17] Of the twenty-four contracts, twelve permit acceleration upon default. They are: Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960) at 264, 265, 267, 268; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 1740, 87th Cong., 2d Sess. (1962), at 279; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 750, 88th Cong., 1st and 2d Sess. (1963-1964) at 43, 81-82, 271, 457, 1163, and 1175; Subcomm. of Financial Institutions, Senate Comm. on Banking and Currency, Hearings on S. 5, 90th Cong., 1st Sess. (1967) at 319. One contract does not permit acceleration for any reason, Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960) at 208.

[18] Of the twenty-four contracts, only seven provide for delinquency charges. They are: Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 2755, 86th Cong., 2d Sess. (1960), at 266, 267, 779; Subcomm. of the Senate Banking and Currency Comm., Hearings on S. 750, 88th Cong., 1st and 2d Sess. (1963-64) at 168, 169, 170-171, 173; Subcomm. on Financial Institutions, Senate Comm. on Banking and Currency, Hearings on S. 5, 90th Cong., 1st Sess. (1967) at 319.

B. *Ford Motor Credit Company's Claim to, and Actual Retention Upon Default and Acceleration of, Interest in Excess of That Retained for Early Payment Constitutes a Charge Which Was Not Disclosed in Violation of §128(a)(9) of the Act and §226.8(b)(4) of Regulation Z.*

FMCC's contracts granted it the right to assess against the Milhollins' account a charge of unearned finance charges upon default occasioned by untimely payment. This right was not disclosed to them. Indeed, FMCC exercised this right by retaining from the Milhollins, upon their untimely payment and FMCC's declaration of default and acceleration of their indebtedness, unearned finance charges of $28.01 in excess of what it would retain for early payment.[19] It asserted and exercised this contractual right notwithstanding its alleged unwritten "policy" to the contrary and notwithstanding any state law allegedly prohibiting the retention of unearned interest.

[19] FMCC claimed $2,415.92, as the unpaid principal balance and late charges, A. 18, but according to our calculations, was entitled to only $2,387.91, an overcharge of $28.01. We obtained this $2,387.91 by first determining how much the Milhollins owed FMCC on February 21, 1975, the date of repossession, A. 21, and the date FMCC demanded payment of an accelerated amount. That amount is $3,015.17. That figure of $3,015.17 is obtained by adding to the original total of payments of $3,084.64, A. 9, the amount of $263.52, as the premium for casualty insurance added to the debt by FMCC on October 4, 1974, Mil. R. 92, 95, and then subtracting the $342.72 in actual payments made by the Milhollins, A. 19, then adding late charges of $9.73. A. 18. We then calculated the rebate of $627.26 and subtracted the rebate from $3,015.17 to obtain $2,387.91.

According to our calculations, FMCC should have rebated $627.26 in unearned charges. The calculation method we used is the same as that set out in Paragraph 14 of the contract: deduct $15 from the Finance Charge, then calculate the rebate according to the sum of the digits method. Since the charges totaled $975.36 and $15 subtracted from that is $960.36, the Milhollins were entitled to a rebate of unearned charges of $960.36 times 29x30/36x37 or $627.26.

1. *FMCC's Retention of Unearned Finance Charges Constitutes a Charge.*

The $28.01 of unearned interest retained by FMCC is a charge within the meaning of Regulation Z §226.8(b)(4). It is a pecuniary liability. It is unearned interest payable only because of the Milhollins' untimely payment and FMCC's declaration of default and acceleration. If the Milhollins had voluntarily prepaid on the date FMCC accelerated the maturity of the contract, they would have had to pay $28.01 less than the $2,440.42 FMCC demanded of them.

The majority of Courts which have considered the question view the creditor's retention of unearned interest as a charge.[20] The Fifth Circuit, in *McDaniel* v. *Fulton National Bank,* 571 F.2d 948, 950, *aff'd on rehearing,* 576 F.2d 1156 (1978), held:

> [W]here the acceleration has the effect to require payment of interest not earned as of the accelerated due date, an additional charge has been imposed .... We find ourselves unable to classify this extra ... payment consequent upon acceleration as anything other than a "default, delinquency or similar charge payable in the event of late payment" which is required to be disclosed. (footnote omitted)

2. *FMCC's Contractually Asserted Right To Retain Unearned Interest Must Be Disclosed.*

Regardless of whether FMCC actually retained unearned interest, the contractual right it arrogated to itself must be disclosed.

[20] See n. 13, *supra.*

FMCC's contractual right to unearned interest upon acceleration is found in each contract's acceleration clause, which provides in relevant part:

> In the event Buyer defaults in any payment . . . Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable.... A. 9, 65.

Under this clause, FMCC has the right not only to the periodic amounts due, but also to all the amounts to become due, comprising unearned interest as well as principal. E.g., *Beneficial Finance Company* v. *Treff,* 134 Ga. App. 17, 213 S.E.2d 126 (1975) ("the entire amount due hereon" upon default and acceleration includes all interest).

Indeed, FMCC does not deny this construction of "amounts due or to become due," but instead suggests that this Paragraph 19 acceleration clause language is somehow modified by Paragraph 14, Petitioners' Brief at 6, a paragraph applying by its very terms only to rebates upon voluntary prepayment.

As discussed, *infra* at pp. 34, 35, voluntary prepayment and acceleration are separate and distinct events, as FMCC readily admits. Petitioners' Brief at 52. If FMCC had intended to limit the amount due upon acceleration by crediting unearned finance charges, it could have stated so simply in Paragraph 19.

FMCC also implicitly argues that, regardless of what the contract actually provides, the express contractual term is modified by state law that allegedly mandates a rebate of unearned finance charges. However, FMCC assumes erroneously and without benefit of any discussion both that Oregon law requires the rebate of unearned finance charges upon acceleration and that express terms

of contracts automatically are superseded by contrary state law.

Oregon law does not prohibit the retention of unearned finance charges upon acceleration. The contracts in question, retail installment contracts for the purchase of motor vehicles, are regulated by Or. Rev. Stat. § 83.510 *et seq.* That statute does not prohibit the retention of unearned finance charges. The Oregon statute, Or. Rev. Stat. § 83.620(1), 1977 Or. L., upon which FMCC relies, requires the rebate of unearned finance charges only upon voluntary payment "in full at any time before maturity." It does not mandate a rebate for forced acceleration of the full unpaid balance upon failure to make timely payment. Nor does state common law make unenforceable the contractual claim to unearned finance charges.

Moreover, it is basic contract law that statutory law is not a part of the contract unless expressly referenced. 3 Corbin, *Contracts* § 551 (1960). Otherwise, no contract could ever be usurious or in any way illegal. Rather, law relevant to a particular contract is consulted to determine the legality of a contract provision or to construe ambiguous terms; relevant law is referred to, not automatically incorporated to modify express contractual terms. *Id.*

FMCC's position is also inconsistent with the Truth in Lending Act's policy of full disclosure. If the creditor need not disclose state law restrictions on its rights, borrowers must become experts in their state statutes and common law to know the true, and "hidden," terms. Without this expertise consumers can neither comparison shop effectively nor assert their rights after the contracts are made. As the United States points out in its *amicus* brief at 24, FMCC's position, "attributes to the borrower a knowledge of the state law, an assumption squarely at odds with the disclosure policies underlying the Act." Thus, this position totally ignores this Court's clear admonition, "Let the

seller disclose." *Mourning* v. *Family Publications Service*, 411 U.S. 356, 377 (1973).

3. *FMCC's Alleged "Policy" of Not Exercising Its Contract Right To Retain Unearned Interest Upon Default and Acceleration Is Irrelevant to Both the Fundamental Scheme and Express Language of Truth in Lending.*

FMCC's hidden "policy" of rebating all unearned finance charges upon acceleration exists at FMCC's unfettered discretion; it is a secret "policy." It was not disclosed to the Milhollins or Eaton and in fact was *never* disclosed until it became desirable to reveal such a "policy" in response to litigation. It is not binding because it is not a term of the contracts, and thus it can be changed at any time. In fact, it was changed by FMCC. *See* pp. 25, 26, *infra*. And this "policy" is not binding on any holder of the contract. It can be ignored by the original creditor, the car dealer; or by his assignee, FMCC; or by a subsequent assignee of FMCC.

Disclosure of only those contractual terms consistent with the creditor's policy is inherently antagonistic to the most fundamental policy of the Truth in Lending Act of full disclosure. The Act requires full and complete disclosure of certain terms, actual and conditional, not only so the consumer can shop but so the consumer at a later date can make informed financial decisions. If the policy is not disclosed, he lacks information to make an informed choice. Because a policy can be changed at any time, the consumer cannot get the benefit of his shopping.

There is no statutory or regulatory foundation for FMCC's contention that its private "policy," announced only after suit, may control its Truth in Lending disclosures. Nowhere in the Act or Regulation Z is there any

explicit or implied statement that contract terms need not be accurately disclosed if the creditor's actual policy is different from the contract terms. Nothing in the Act or in Regulation Z endorses the non-disclosure of a creditor's contractual rights just because the creditor may later waive them. Regulation Z especially requires a disclosure of rights that are often waived. *See* §226.8(a)(7) (in an open-end transaction, the creditor must disclose the "conditions under which a finance charge may be imposed" even though "the creditor may, at his option and without disclosure, refrain from imposing such finance charge."); §226.8(b)(5) (a creditor must disclose its security interest even if it waives its right to repossess the secured property); §226.8 (b)(7) (a creditor must disclose any prepayment penalty even though it may waive that penalty at a later date).

As the Fifth Circuit said *en banc* in *McDaniel* v. *Fulton National Bank,* 576 F.2d 1156, 1157 (1978):

> [T]he lenders urge . . . that even though a creditor possesses a contract right to accelerate payment and retain unearned finance charges, he need not disclose this right unless he in fact does so in the course of the collection process. We reject this interpretation out of hand as making disclosure requirements depend upon acts which may or may not take place in the collection process rather than on the creditor's rights acquired at the time the loan is made.
>
> What signifies is not what rights the creditor *exercises* in the event of default or how he exercises them but what rights he *possesses* under his contract with the debtor.

The United States also criticized FMCC's "creditor policy" approach:

> [Refusal] to require disclosure of a creditor's unwritten policies when they conflict with the contract [constitutes a failure] to provide the borrower with the information that is most useful in comparing the cost of credit. Brief for the United States as Amicus Curiae at 12.

The potential abuse inherent in conditioning disclosures on unstated, non-contractual credit "policy" is evident here. FMCC has had at least three separate unstated "policies" on rebating unearned interest upon acceleration. In 1972 FMCC's "policy" was to retain unearned interest. In *Block* v. *Ford Motor Credit Company,* 286 A.2d 128 (D.C. App. 1972), FMCC sued and attempted to obtain a judgment for unearned finance charges based upon contractual language virtually identical to that in Paragraph 19. In 1975, in the Milhollin case, FMCC claimed in an affidavit that it no longer retained unearned interest but rather rebated it as of the date of acceleration.[21] In 1977 in the Eaton case, FMCC claimed in a second affidavit that it rebated unearned interest, but now calculated the rebate not as of the date of acceleration, but the date of payment.[22] Thus, *Block* and the two affidavits

[21] L. B. Plummer, Manager of FMCC's Portland, Oregon branch, stated in his November 19, 1975 affidavit:

> "In the event Ford Motor Credit Company decides to accelerate the balance owed as a result of the default of the contract purchaser, it always computes the interest rebate *the same as* it would compute it *if the contract purchaser voluntarily prepaid* the contract, as set forth in Paragraph 14 of the face of the contract." (Emphasis supplied) A. 22.

[22] William F. Bellisasio, Manager of FMCC's Portland, Oregon branch, testified in the Eaton trial:

> "*Whenever Ford Credit is prepaid,* whether the prepayment is instigated by the customer or results from an acceleration by Ford Credit, the interest rebate is calculated and allowed in the exact same manner." (Emphasis supplied). A. 68.

reveal that FMCC has had at least three different "policies." At first it made no rebate. Then it rebated on the date of acceleration; finally, it calculated the rebate on the date of payment following acceleration. The policy it followed was the one in effect on the date of acceleration, not the date of the contracts; thus, the consumer could not know, on the date of the contract, what his full potential liabilities and obligations were.

Not only did FMCC's "policy" change, it appears that FMCC did not even follow its "policy." It claimed that the Milhollins owed FMCC $2,415.92 in principal and late charges. Under its "policy," the Milhollins would have owed FMCC only $2,387.91. The $2,415.92 represented more than an amount to which FMCC claimed its "policy" entitled it. FMCC's "policy" would allow FMCC to demand the unpaid balance minus a full rebate of unearned interest, or $2,387.91. FMCC failed to follow its "policy."

C. *FMCC's Right To Retain a $15 Acquisition Fee Is a Default Charge Payable in the Event of Late Payment That Must Be Disclosed.*

Even if one entirely accepts FMCC's definition of default charge as a monetary sum assessed as an extra charge because of late payment, FMCC has violated the Truth in Lending Act and Regulation Z by assessing a default charge which it failed to disclose. That charge is a $15 acquisition fee which FMCC undeniably retained upon acceleration.[23]

[23] *Griffifth* v. *Superior Ford*, 577 F.2d 455 (8th Cir. 1978). The Federal Reserve Board staff also views an "acquisition fee" as a "charge." In Federal Reserve Board Letter 472 (May 3, 1971) Consumer Credit Guide (CCH) ¶ 30,672, the Federal Reserve Board staff addresses the effect of a deduction of an acquisition charge prior to calculating the rebate of the unearned finance charge in the event of early payment. The staff referred to the early payment section, Regulation Z §226.8(b)(7) which requires the disclosure of two items: one, whether a rebate of unearned finance charges will be made and, if so, the method of calculating it; and two, the amount or method of calculating any charge that may be deducted from the rebate. It concluded that an acquisition fee, when it is deducted from the rebate of unearned interest, is a charge, and failure to disclose it violates Regulation Z. Under this logic, if this $15 fee is a charge to be disclosed under Regulation Z §226.8(b)(7) in the event of early payment, then when it is imposed upon late payment, it is a charge to be disclosed under Regulation Z §226.8(b)(4).

FMCC has argued throughout this case that its method of rebate of unearned finance charges upon acceleration is identical to its method of rebate upon prepayment. A. 21, 68. That method, set out in Paragraph 12 of the contract, is to deduct $15 from the finance charge before calculating the unearned interest to be returned to the consumer. This $15 is a default charge under FMCC's own definition. It is a monetary sum. It is an extra charge in excess of any interest earned under the scheduled periodic payments at the time a rebate is calculated. It is assessed because the consumer has failed to make timely payment and FMCC has declared him in default and accelerated the maturity of the contract.

An acquisition charge is a default charge as defined by the Circuit Courts as well. In *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 266 (1975) the Third Circuit defined default charge as a "specific pecuniary sum assessed against the borrower solely because of his failure to make his payments in a timely manner."[24] Thus, regardless of whether "default charge" includes the accelerated unpaid balance, it necessarily includes this $15 acquisition fee, and this Court is warranted in finding a violation of Regulation Z §226.8(b)(4).

[24] The Federal Reserve Board staff also uses this definition of default charge, Official Staff Letter FC-0054, (April 4, 1977) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, 42 Fed. Reg. 18056 (1977).

III. This Court Should Not Defer to the Staff Letters and Official Staff Interpretation on the Subject of Acceleration.

A. *The Board Itself Has Not Spoken Concerning Acceleration, and Deference Is Not Due to the Staff's Opinions.*

The Board has not spoken, either by amendment or official interpretation, on the issue of acceleration, even though this question has been presented repeatedly through letters to the Board, petitions to the Board, and litigation. Rather, there exist only a staff interpretation and three opinion letters[25] which continue to confuse because of the Board's silence.

The sole staff interpretation involved here (Interpretation FC-0054) was issued before adoption by the Board of formal procedures which now provide the opportunity for outside views and comments. *See* Regulation Z, 12 C.F.R. §226.1(d) (amended Apr. 21, 1978). Public information letters are written in response to individual inquiries concerning Truth in Lending requirements, generally submitted by creditors. They represent the opinion of one employee of the agency on one specific factual circumstance and as such are not intended as statements of general applicability based on comprehensive analysis of Regulation Z and the purposes of the Truth in Lending Act. There is no established procedure for agency review of these letters, and no public comment is solicited. Yet this Court is being asked

[25] Federal Reserve Board Public Information Letter 851 (October 22, 1974) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173; Federal Reserve Board Official Staff Interpretation FC-0054 (April 4, 1977 [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, 42 Fed. Reg. 18056 (1977); Federal Reserve Board Public Information Letter 1208 (July 6, 1977) [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,647; and Federal Reserve Board Public Information Letter 1324 (November 14, 1978) 5 Cons. Cred. Guide (CCH) ¶ 31,827.

to defer to statements which, because of their summary method of issuance and limited scope, have suffered greatly from lack of clarity and consistency.

The staff's vacillations are exemplified by even a cursory survey of the Truth in Lending interpretations and staff letters reported during the single month of August, 1979, in the Consumer Credit Guide. No less than six of these contain modifications, corrections, or rescission of past letters and interpretations. *See* Official Staff Interpretation FC-0163[26] (correcting consumer leasing disclosures published almost three years previously, at Fed. Reg. 45538); Official Staff Interpretation FC-0164[27] ("reconsidering" and "modifying" a public information letter and an official staff interpretation dealing with disclosure of multiple creditors); Letter 1337[28] ("modifying" a previous letter and three official staff interpretations which "incorrectly use" language concerning authorization for credit insurance purchases); Official Staff Interpretation FC-0166[29] ("rescinding" a letter concerning disclosure of required deposit balances); Letter 1344[30] ("modifying" a letter which took an "unnecessarily strict" position on changes of terms in open-end credit plans); and Letter 1340[31] ("rescinding' 'a letter on

[26] Federal Reserve Board Official Staff Interpretation FC-0163 (July 27, 1979) Cons. Cred. Guide (CCH) ¶ 31,842, 44 Fed. Reg. 37603 (1979).

[27] Federal Reserve Board Official Staff Interpretation FC-0164 (August 17, 1979) Cons. Cred. Guide (CCH) ¶ 31,843, 44 Fed. Reg. 41760 (1979).

[28] Federal Reserve Board Public Information Letter 1337 (March 26, 1979) Cons. Cred. Guide (CCH) ¶ 31,845.

[29] Federal Reserve Board Official Staff Interpretation FC-0166 (September 7, 1979) Cons. Cred. Guide (CCH) ¶ 31,856, 44 Fed. Reg. 46438 (1979). It also is worth noting that this interpretation itself now has been suspended by the Board, after a short published life span of one month (44 Fed. Reg. 54291-94).

[30] Federal Reserve Board Public Information Letter 1344 (June 1, 1979) Cons. Cred. Guide (CCH) ¶ 31,852.

[31] Federal Reserve Board Public Information Letter 1340 (April 30, 1979) Cons. Cred. Guide (CCH) ¶ 31,848.

multiple advance loans, on the ground that the previous letter had been "in error").

It should come as no surprise, then, that many courts have wisely refused to follow informal opinion letters written by Federal Reserve Board employees on Truth in Lending issues, recognizing that these letters should not be considered as authoritative as the actual agency regulation or formal interpretations. The court in *Pedro* v. *Pacific Plan,* 393 F.Supp. 315, 323 (N.D. Cal. 1975) correctly stated:

> Although such correspondences [opinion letters] are a 'valuable tool' in informing the public of the law's requirements, the opinions contained therein are not binding on this, or any other, court.

Other courts have similarly concluded that opinion letters written by a lone Board employee have little weight and have rejected certain letters. *See,* for instance, *Pollock* v. *General Finance Corp.,* 535 F.2d 295 (5th Cir. 1976), *aff'd on rehearing,* 552 F.2d 1142 (5th Cir. 1977), *cert. denied,* 434 U.S. 891 (1977); *Martin* v. *Commercial Securities Co.,* 539 F.2d 521 (5th Cir. 1976); and *Willis* v. *Town Finance Corp.,* 416 F.Supp. 10 (N.D.Ga. 1976). Even courts which have agreed with particular letters took great pains to note that the letters are not authoritative: *Bissette* v. *Colonial Mortgage Corp.,* 477 F.2d 1245 (D.C. Cir. 1973); *Bloomer* v. *McKnight Road Dodge, Inc.,* 397 F.Supp. 403 (W.D. Pa. 1975); *Philbeck* v. *Timmers Chevrolet, Inc.,* 499 F.2d 971 (5th Cir. 1974); *English* v. *MCC Financial Services, Inc.,* 403 F.Supp. 679 (M.D. Ga. 1975), *aff'd,* 520 F.2d 941 (5th Cir. 1975).

The only other Truth in Lending case to reach this Court, *Mourning* v. *Family Publications Service,* 411 U.S. 356 (1973), does not even remotely suggest that the courts are bound by informal opinion letters written by Board employees. *Mourning,* in upholding the authority of the

Board itself to promulgate the "Four Installment Rule" within Regulation Z, now at §226.2(S), held that it was not inconsistent with the purposes of the Act to include all transactions of more than four installment payments within the scope of credit transactions covered by the Act. Although recognizing the flexibility allowed to administrative agencies in general, and to the Board in particular, the Court emphasized that such flexibility was appropriate to regulate intentional evasion of the Act by creditors, which would undermine the basic operation of the Act:

> In delegating rulemaking authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware.

Certainly *Mourning* stands for the proposition that the Board itself has authority to promulgate regulations to further the purposes of the Truth in Lending Act. In this case, however, there is no such challenge to the authority of the Board to promulgate regulations. Further, there have been no official statements by the Board itself on acceleration, even though the Board certainly is aware of the confusion surrounding this issue. There only are a staff interpretation and three staff opinion letters, described by the Board as follows:

> (ii) Official staff interpretations will be issued upon those requests which in the opinion of the designated officials, require clarification of technical ambiguities in this Part or which have no significant policy implications.
>
> (iii) Unofficial staff interpretations will be issued where the protection of section 130(f) of the Act is

neither requested nor required, or where time strictures require a rapid response.[32]

Had the Board wished to issue a statement applicable to all situations, and not merely to the specific facts at hand, it could have and should have issued an official Board interpretation:

> . . . (i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.[33]

The Board thus has not addressed the policy questions involved with the acceleration issue; instead, various Board employees have made a series of statements concerned with specific factual situations. The question at hand is not the authority of the Board to issue regulations, but whether deference is due to informal staff opinion letters. *Mourning* neither involved nor addressed this issue.

B. *The Staff Interpretation and Staff Opinion Letters Are So Illogical, Inconsistent and Confusing That They Provide No Guidance Whatsoever.*

1. *Where Inconsistency and Confusion Are Evident in Interpretations and Letters, This Court Should Not Defer to Them.*

This is not a case in which an agency has acted in accord with a well-established agency interpretation in effect without change for eighty years or more.[34] Rather,

[32] Regulation Z §226.1(d)(4)(ii) and (iii).
[33] Regulation Z §226.1(d)(4)(i).
[34] See, for instance, *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978), relied upon in Petitioner's Brief, p. 21.

this case involves four confusing and contradictory statements issued by the staff of the Federal Reserve Board over a three-year period, none of which embodies the official view of the agency itself. Under such circumstances, this Court should not defer to the opinion letters and staff interpretation.

This Court has enunciated the standard of consistency to be applied to regulations or interpretations by an agency; certainly no lesser standard should be applied to the informal letters and interpretations issued by the Board staff. *Skidmore* v. *Swift and Co.,* 323 U.S. 134, 140 (1944), held that courts should give weight to agency interpretations and opinions only *if* they showed consistency with earlier and later pronouncements on the same issue, and validity of reasoning as exhibited by thoroughness in considering the issue. Under the *Skidmore* standard, the letters and interpretation here would not be entitled to any deference even if they were official interpretations by the Board itself, due to their inconsistency, confusion, and unworkable nature.

Many other cases decided by this Court are in accord with the *Skidmore* standard. *See: Estate of Sanford* v. *Commissioner,* 308 U.S. 39 (1939) (an ambiguous Treasury Regulation has no persuasive force); *Alexander* v. *Cosden Pipe Line Co.,* 290 U.S. 484 (1934) (refusing to defer to the Commissioner of Internal Revenue's interpretation of a Revenue Act where the Commissioner had not issued uniform statements); *United States* v. *Calamaro,* 354 U.S. 351 (1957) (a Treasury Regulation found internally inconsistent has impaired persuasive force); *Espinoza* v. *Farah*

Mfg. Co., 414 U.S. 86 (1973) (no weight given to an EEOC regulation, partially because the Commission had once adopted a different definition of "national origin"); *Morton* v. *Ruiz*, 415 U.S. 199 (1974) (Bureau of Indian Affairs rules and regulations promulgated in an agency manual not deferred to where inconsistent with the agency's earlier pronouncements); and *Haggar Co.* v. *Helvering*, 308 U.S. 389 (1940) (Treasury Regulation rejected where interpretations of the statute had been inconsistent).

Lower court decisions under the Truth in Lending Act have rightly recognized that staff opinion letters or interpretations should not be deferred to if they are confusing or inconsistent. For example, the Fifth Circuit in *Pollock* v. *General Finance Corp.*, *supra* at 1144-45, refused to follow two opinion letters concerning after-acquired property, because they "appear[ed] to conflict with" an earlier letter still in effect. *See also Brooks* v. *Stone Mountain Ford, Inc.*, Cons. Cred. Guide (CCH) ¶98,554 (N.D. Ga. 1975) (only "clear and unequivocal" opinion letters should be given weight by the courts).

2. *The Interpretation and Letters Show a Fundamental Misunderstanding of the Consumer's and Creditor's Views of Credit in Erroneously Equating Acceleration of Payments with Prepayment.*

Federal Reserve Board Public Information Letter 851, issued following the opinion in *Garzo* v. *Chicago Health Clubs, Inc.*, 347 F.Supp. 955 (N.D. Ill. 1972),[35] viewed acceleration of payments as "essentially a prepayment of the contract obligation." This assumption is relied upon in all of the subsequent releases.

[35] It is worth noting that the Eaton contract was signed on January 28, 1975, and the Milhollin contract in July, 1974. Therefore, FMCC could not possibly have relied on any of the letters or the interpretation in the Milhollin transaction, and only Letter 851 existed at the time of the Eaton contract. *Garza* thus was the chief authority on the acceleration issue when these contracts were consummated.

This equation of acceleration of payments with voluntary prepayment is totally erroneous from both the consumer's and creditor's perspective, as is evident from an elementary comparison of the processes involved. Indeed, FMCC admits as much. Petitioner's Brief at 52. (Acceleration is "both the legal and logical antithesis of prepayment.") Voluntary prepayment occurs at the option of the consumer, at a time when the payment of an amount far in excess of the regular monthly payment has become desirable. The consumer wishing to prepay an obligation has examined other financial obligations and has decided that such early payment would not endanger payment of those obligations. Acceleration, to the contrary, involves no such voluntary action by the consumer. It consists of a breach of contract terms by the consumer, followed by a unilateral demand by the creditor for a lump sum payment, a demand unexpected where no disclosure of the right to accelerate payments has been made. The consumer who has fallen behind on monthly payments rarely is capable of making a lump sum payment upon demand; indeed, the regular payment typically has been late precisely because of inability to pay even this smaller sum. Few creditors expect actual payment of the accelerated payment upon demand; rather, they anticipate the additional events of repossession and a deficiency judgment. To assume that a consumer would understand that the word "prepayment" includes this entire process of acceleration certainly is incorrect and contrary to the Truth in Lending Act's purpose of providing meaningful disclosure.[36]

[36] 15 U.S.C. §1601.

3. The Staff Opinion Letters and Interpretation Confusingly Mix the Disclosures Required Under Regulation Z §§226.8(b)(4), 226.8(b)(7), and 226.6(c).

By equating prepayment and acceleration of payments, the opinion letters and staff interpretation produce a contorted analysis of the acceleration process, as if it potentially involves both a prepayment of the obligation, which must be disclosed as such under Regulation Z §226.8(b)(7), and a default charge to be disclosed under Regulation Z §226.8(b)(4), if the creditor rebates less unearned finance charges following acceleration than it does following prepayment. Thus, acceleration constitutes "prepayment" where the creditor does not make additional charges to the consumer whose obligation has been accelerated, and so no additional disclosure is required beyond the prepayment disclosures of Regulation Z §226.8(b)(7). But, if sums are demanded beyond the amount due on prepayment, acceleration evidently loses some of its characterization as a "prepayment," and the excess amount demanded becomes a "charge" to be disclosed under Regulation Z §226.8(b)(4). By defining the acceleration of payments in this hybrid fashion, the letters and staff interpretation have one outstandingly consistent feature: they confuse the consumer and wrongly assume that he or she will instinctively discover these distinctions without even the benefit of disclosure of the right to accelerate payments.

In the most recent staff opinion letter on acceleration, Letter 1324, yet a third provision of Regulation Z is drawn into the debate. In Letter 1324, a creditor is permitted to claim a contractual right to unearned finance charges following acceleration, even though state law requires a rebate. However, such language may constitute misleading and confusing "additional information" within the meaning of Regulation Z §226.6(c). Whether a violation of this provision exists depends upon unspecified "circumstances of a particular case," according to the Letter. In addition to the problems facing consumers under this rather bizarre approach, Letter 1324 is equally unhelpful to the creditor who in good faith, is attempting to comply with the Truth in Lending Act's disclosure requirements. Apparently, even the creditor who discloses an acceleration clause in accord with the "test" of this Letter still may be considered in violation of Regulation Z. And ironically, after the Board has seemingly ignored virtually all of the numerous District and Circuit Court cases on acceleration for years, this Letter cautions creditors to "be aware of court holdings in their particular jurisdiction"—none of which precisely conform to the Letter's approach, or that of any of the other three releases. The creditor seeking guidance from the Board also has returned empty-handed.

4. The Letters and Interpretation Confuse the Date of Acceleration With the Date of Payment Following Acceleration.

According to Letter 851, disclosure of an acceleration clause would be required as a "charge" under Regulation Z §226.8(b)(4) only if, *"upon acceleration,"* the creditor retained unearned finance charges beyond those which would have been rebated under the disclosed provisions concerning rebate upon voluntary prepayment. The date of acceleration of payments is considered the key to measuring rebate, and to whether disclosure of the acceleration clause is required.

However, Interpretation FC-0054, while purporting to clarify the language of Letter 851, actually confuses that Letter. It states that a charge which must be disclosed under §226.8(b)(4) occurs if the creditor rebates less unearned finance charges than would have been rebated under

the disclosed prepayment rebate provisions, *"when the customer pays* the balance of the obligation upon acceleration" (emphasis added). No disclosure is required where the creditor rebates by the disclosed prepayment method, *"when the customer pays* . . . upon acceleration" (emphasis added). As revealed by the variety of state statutes regarding rebate in acceleration situations,[37] this is a significant and well-established difference. The date "when the customer pays" is rarely the exact date of acceleration, the date actually mentioned in Letter 851. Rather, the acceleration date is that on which the full amount ot indebtedness is declared to be immediately due. Pa‸ nent itself would follow various other events, such as repossession and resale, filing of suit, and deficiency judgment. The statutes of about half the states recognize these additional events as the keys to measuring rebate of unearned finance charges. For instance, rebate must be made as of the date of acceleration in Iowa;[38] as of the date that the creditor files suit in Louisiana;[39] and as of the date of judgment in Colorado.[40] Further, the statutes of the other half of the states appear to contain no rule concerning rebate after acceleration.

The staff of the Board thus is encouraging the kind of chaotic situation that all parties here are anxious to avoid: making disclosures under Truth in Lending dependent on an event which varies widely from state to state; and requiring a case-by-case examination of each transaction to determine the amount of unearned interest which would be retained under both acceleration and prepayment.[41]

[37] See Appendix A of Respondent's Brief.
[38] Iowa Consumer Credit Code §2.510(6).
[39] Louisiana Consumer Credit Law §9.3529.
[40] UCCC §§2.210(8) and 3.210(8).
[41] In Letter 1324, the phrases "upon acceleration" and "upon payment following acceleration" are used interchangeably. *Amicus* confesses to an inability to rationally explain what disclosures would be required therein.

5. *The Staff Letters and Interpretation Are Contrary to Regulation Z and the Fundamental Policy of the Act in Linking Disclosure of Acceleration Clauses to a Creditor's Undisclosed "Policy."*

According to the two most recent staff opinion letters concerning acceleration, Letters 1208 and 1324, the fact that the contract gives the creditor a right to all unearned finance charges apparently is irrelevant to disclosure, where state law may require a rebate of some or all of this amount.

Letter 1208 addresses the common situation where the disclosure statement makes no reference to a right of acceleration, but the promissory note contains an acceleration clause under which the creditor claims the entire unpaid balance, with no mention of rebate of unearned finance charges in the event of payment after acceleration. According to the Letter, the key factor in determining whether disclosure should occur is "whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement." The individual creditor's policy thus is considered determinative of whether or not disclosure is required.

By looking to each creditor's rebate policy in a vacuum, this Letter fails to consider the detrimental effects of its approach on even a highly aware consumer. Not once in the Act or in Regulation Z is the disclosure of any required term linked to whether a creditor has a policy of exercising a claimed right. In fact, exactly the opposite approach is taken. For example, disclosure of the property serving as security for payment is required without qualification under 15 U.S.C. §§ 1638(a)(10) and 1639(a)(8) and Regulation Z §226.8(b)(5).[42] This disclosure must be made

[42] Reg. Z §226.8(b)(5) requires disclosure of ". . . any security interest held or to be retained or required by the creditor."

even though it is common practice for creditors who take an interest in household goods to accelerate payments and seek a money judgment upon default, rather than seizing the secured property. The fact that the creditor has a policy against exercising its contractual right to claim secured property does not mean that disclosure of this right is not crucial to the consumer shopping for credit. The creditor still has the right to take this property, and could change its policy at any time. Similarly, Regulation Z §226.8(b)(6) mandates disclosure of "any penalty charge that *may* be imposed . . . for prepayment," in transactions not involving precomputed interest. Again, in an "open-end" credit transaction, a creditor must disclose "the conditions under which a finance charge may be imposed," even though "the creditor may, at his option and without disclosure, refrain from imposing such finance charge."[43] By introducing "creditor policy" as the key to whether or not disclosure of acceleration clauses is required, the letter is setting an extremely dangerous precedent to be applied to other disclosures as well. A creditor may change its policy any number of times between the consummation of a contract and the acceleration of an obligation. In fact, FMCC itself evidently changed its rebate policy between 1975 and 1977.[44]

Further, there is serious doubt whether any statutory or regulatory basis exists for the staff's assumption that a required disclosure is optional, depending on the particular circumstances of a transaction, such as "creditor policy." The one court that considered this issue concluded that the Board lacks this authority. In *Tarplain* v. *Baker Ford, Inc.*, 466 F.Supp. 1340, 1348-49 (D.R.I. 1979), *en route* to holding that unearned finance charges retained

[43] See 15 U.S.C. §1637(a)(1) and Reg. Z §226.7(a)(1).
[44] See notes 21 and 22, *supra*.

upon acceleration constitute a "charge" to be disclosed under 15 U.S.C. §1638(a)(9) and Regulation Z §226.8(b)(4), the court stated:

> Both Interpretation No. FC-0054 and Staff Opinion Letter 1208 recognize that retention of unearned interest is a "charge" within the meaning of 15 U.S.C. §1638(a)(9) and 12 C.F.R. §226.8(b)(4) which should be disclosed. There is no statutory basis, however, for then concluding that such a charge need only be disclosed in certain circumstances, i.e., when it is actually imposed and imposed in a manner different from that applied to voluntary prepayment. Nothing in the statute or Regulation Z indicates that any of the disclosure requirements are optional at any time; the statute simply states that a creditor "shall disclose . . . . (9) The default, delinquency, or similar charges payable in the event of late payments," 15 U.S.C. §1638(a), and Regulation Z is similarly unequivocal. Such mandatory language requires disclosure of charges imposed upon late payments without reference to whether or not they are collected.

The final staff opinion on acceleration, Letter 1324, addresses the common situation where the disclosure statement does not mention acceleration, and the contract gives the creditor the right to retain unearned finance charges following acceleration even though state law requires a rebate. For the first time, the staff considers state statutes which govern the rebate of unearned finance charges following acceleration. Letter 1324 meticulously avoids the propriety of claiming a contractual interest in violation of state law. Instead, it states that, even though the creditor may claim a contractual right, following acceleration, to

unearned interest beyond the amount it could retain upon voluntary prepayment, there is no "charge" under Regulation Z §226.8(b)(4) if state law requires a rebate as great as that made upon prepayment. Thus, a creditor is permitted to claim unearned finance charges beyond those permitted under state law, and the letter further seems to assume that the undisclosed "creditor policy" concerning rebate will always conform to state law.

Again, consumers are left in the dark, unable to comparison shop for credit without detailed knowledge of state law, a result certainly contrary to the essence of the Truth in Lending Act: meaningful disclosure to consumers of important credit terms.

C. *The Court, Not the Administrative Agency, Has Primary Expertise on the Purely Legal Question of Whether the Act Requires Disclosure of Acceleration Clauses.*

The question of whether disclosure of the creditor's right to impose immediate payment of the full unpaid balance upon default and acceleration is required by the Truth in Lending Act is a purely legal question of interpretation of statutory language and determination of congressional intent. It does not involve any agency expertise in applying unique or particular facts to enforce general statutory language. It does not require complex economic analysis. It does not even involve interpretations of the agency's own language in its regulations. Indeed, the regulatory provision merely repeats verbatim the statutory language found in 15 U.S.C. §§1638(a)(9) and 1639(a)(7).[45]

Certainly, where the Board has issued no official statements concerning acceleration, and the opinion letters and interpretations are inadequate, the Court itself should address the major policy issues concerned here. Indeed, this Court has not hesitated to use its own independent judgment where agency findings and interpretations have been at odds with the Court's view of the broad congressional purposes underlying a statute. *See Morton* v. *Ruiz,* 415 U.S. 199 (1974); *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953); and *Zuber* v. *Allen,* 396 U.S. 168 (1969). And, even where such a conflict between an interpretation and congressional intent has not been as apparent, the Court has used its own independent judgment where broad policy issues have arisen. *Texas Gas Transmission Corp.* v. *Shell Oil Co.,* 363 U.S. 263 (1960); *Commissioner* v. *Tellier,* 383 U.S. 687 (1966).

[45] 15 U.S.C. §1638(a)(9) requires disclosure in sale transactions of "default delinquency, or similar charges payable in the event of late payments." 15 U.S.C. §1639(a)(7) applies the same language to loan transactions. Reg. Z §226.8(b)(4) mandates the same disclosure for both sales and loans.

D. *The "Good Faith Conformity" Defense of the Act Is Designed Solely as an Equitable Defense to Individual Creditor Liability, and Confers No Validity on Any Regulatory Provisions or Agency or Staff Interpretations.*

Congress did not intend the "good faith conformity" defense of the Truth in Lending Act, 15 U.S.C. §1640(f), to confer any validity on interpretations issued by the Board and its staff. Rather, it only provides a personal defense against liability to a creditor who has acted in "good faith conformity" with Regulation Z provisions or interpretations. There is absolutely nothing in this provision which states or even implies that, merely because a creditor may act in conformity with a staff informal letter or staff interpretation, the letter or interpretation is binding on any judicial construction of the Act. Otherwise, no regulation or interpretation which a single creditor claimed to have relied upon could ever be found invalid, no matter how incorrect. Indeed, the clear language of §1640(f)

expressly contemplates the opposite conclusion, that courts can and may find such regulations or interpretations invalid. Section 1640(f) provides that the defense exists,

> . . . notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, *or determined by judicial or other authority to be invalid for any reason.* [emphasis supplied][46]

The legislative history accompanying Section 1640(f), which was added in 1974 and amended in 1976,[47] confirms this conclusion. In 1976, Senator Proxmire urged adoption of the language which eventually was placed within the statute:

> In addition the House amendment would authorize the Federal Reserve Board to delegate to its staff the authority to issue interpretations or approvals that would have binding effect in subsequent litigation over violations of the Truth in Lending Act. That is, *compliance with such an interpretation would constitute an absolute defense to a creditor until that interpretation was reversed by higher authority.* . . . [emphasis supplied][48]

Thus, Congress explicitly expected a court to examine the validity of a staff letter or interpretation, and even a provision of Regulation Z itself, regardless of the fact that some creditor might have relied on it.

This approach does not lead to "absolute chaos" in the

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[46] The brief of *amicus* United States, at 34, erroneously states that Congress intended "beyond question" to bar judicial review of agency interpretations. The statutory language is in explicit contradiction to this assertion.

[47] Added by Pub.L. 93-495, 88 Stat. 1518 (Oct. 28, 1974); amended by Pub.L. 94-222, 90 Stat. 260 (Mar. 23, 1976).

[48] 122 Cong. Rec. 2837 (1976).

marketplace, contrary to Petitioners' argument.[49] In fact, creditors are provided more protection under the Truth in Lending Act than under most other statutes. The one-year statute of limitations on Truth in Lending Actions bars suits on contracts consummated over a year ago; and the "good faith conformity" defense provides a shield against liability for any creditor who relied on FC-0054 within the one-year limitation period. Certainly, FMCC should not claim the protection of the "good faith conformity" defense when the consummation of the Milhollin contract preceded the enactment of Section 1640(f).

Conclusion

The existence of an acceleration clause is an essential disclosure for consumers, in light of both the congressional policy underlying the Truth in Lending Act and the devastating results of the exercise of such clauses by creditors. Disclosure of the right to accelerate payments is mandated here by §128(a)(9) of the Act and §226.8(b)(4) of Regulation Z, for in the transactions at hand FMCC imposed a "charge" for late payments in three different ways. Further, the Court is not obliged to defer to statements by the Federal Reserve Board or its staff here, but instead should require disclosure of the right to accelerate payments regardless of creditor policy or state law concerning rebate of unearned finance charges. The opinion of the Circuit Court therefore should be affirmed.

Respectfully submitted,

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[49] Petitioners' Brief at 26.

WASHINGTON

CONSUMER LOAN NOTE

Date______________, 19______

The words I and me mean all borrowers who signed this note. The word bank means The National Bank of Washington.

Promise to Pay

__________months from today, I promise to pay to The National Bank of Washington ____dollars($).

Responsibility

Although this note may be signed below by more than one person, I understand that we are each as individuals responsible for paying back the full amount.

Breakdown of Loan

This is what I will pay:

Amount of loan	1. $__________
Credit Life Insurance (optional)	2. $__________
Other (describe) ____________________	3. $__________
Amount Financed (Add 1 and 2 and 3)	4. $__________
FINANCE CHARGE	5. $__________
ANNUAL PERCENTAGE RATE	__________%
Total of Payments (Add 4 and 5)	$__________

Repayment

This is how I will repay:
I will repay the amount of this note in________equal uninterrupted monthly installments of $__________ each on the_______day of each month starting on the _______day of ______________, 19____, and ending on_____________________, 19____.

Prepayment

If I pay this loan off in full, ahead of schedule, I will not have to pay the full finance charge. I will pay a finance charge on the amount I have borrowed (amount financed) only for the number of days I have had the loan—from the day I received the loan until the day I pay off the loan.

Late Charge

Any installment not paid within ten days of its due date shall be subject to a late charge of 5% of the payment, not to exceed $5.00 for any such late installment.

Security

To protect The National Bank of Washington, I give what is known as a security interest in my auto and/or other: (Describe)__________________________.
See the security agreement.

Credit Life Insurance

Credit life insurance is not required to obtain this loan. The bank need not provide it and I do not need to buy it unless I sign immediately below. The cost of credit life insurance is $__________for the term of the loan.

Signed: ____________________________ Date:__________

Default

If for any reason I fail to make any payment on time, I shall be in default. The bank can then demand immediate payment of the entire remaining unpaid balance of this loan, without giving anyone further notice. If I have not paid the full amount of the loan when the final payment is due, the bank will charge me interest on the unpaid balance at six percent (6%) per year.

Right of Offset

If this loan becomes past due, the bank will have the right to pay this loan from any deposit or security I have at this bank without telling me ahead of time. Even if the bank gives me an extension of time to pay this loan, I still must repay the entire loan.

Collection Fees

If this note is placed with an attorney for collection, then I agree to pay an attorney's fee of fifteen percent (15%) of the unpaid balance. This fee will be added to the unpaid balance of the loan.

Co-borrowers

If I am signing this note as a co-borrower, I agree to be equally responsible with the borrower for this loan. The bank does not have to notify me that this note has not been paid. The bank can change the terms of payment and release any security without notifying or releasing me from responsibility for this loan.

Copy Received

I received a completely filled in copy of this note. If I have signed for Credit Life Insurance, I received a copy of the Credit Life Insurance certificate.

Borrower:______________________________

____
Address

Co-borrower:____________________________

____
Address

Co-borrower:____________________________

____
Address

CONSUMER CREDIT HOTLINE: If you have any questions, please call us immediately at (202) 624-3619.

1-Bank's copy 2-Customer's copy 3-File copy

First National City Bank

Consumer Loan Note Date____________________, 19____

(In this note, the words **I, me, mine** and **my** mean each and all of those who signed it. The words **you, your** and **yours** mean First National City Bank.)

Terms of Repayment To repay my loan, I promise to pay you ________________________________Dollars ($__________). I'll pay this sum at one of your branches in __________ uninterrupted ______________ installments of $_________ each. Payments will be due ________________________, starting from the date the loan is made.

Here's the breakdown of my payments:

1. Amount of the Loan $__________
2. Property Insurance Premium $__________
3. Filing Fee for Security Interest $__________
4. Amount Financed (1+2+3) $__________
5. **Finance Charge** $__________
6. Total of Payments (4+5) $__________

Annual Percentage Rate______%

Prepayment of Whole Note Even though I needn't pay more than the fixed installments, I have the right to prepay the whole outstanding amount of this note at any time. If I do, or if this loan is refinanced—that is, replaced by a new note—you will refund the unearned **finance charge,** figured by the rule of 78—a commonly used formula for figuring rebates on installment loans. However, you can charge a minimum **finance charge** of $10.

Late Charge If I fall more than 10 days behind in paying an installment, I promise to pay a late charge of 5% of the overdue installment, but no more than $5. However, the sum total of late charges on all installments can't be more than 2% of the total of payments or $25, whichever is less.

Security To protect you if I default on this or any other debt to you, I give you what is known as a security interest in my O Motor Vehicle and/or ____________________ (see the Security Agreement I have given you for a full description of this property), O Stocks, O Bonds, O Savings Account (more fully described in the receipt you gave me today) **and** any account or other property of mine coming into your possession.

Insurance I understand I must maintain property insurance on the property covered by the Security Agreement for its full insurable value, but I can buy this insurance through a person of my own choosing.

Default I'll be in default:

1. If I don't pay an installment on time; or
2. If any other creditor tries by legal process to take any money of mine in your possession.

You can then demand immediate payment of the balance of this note, minus the part of the **finance charge** which hasn't been earned figured by the rule of 78. You will also have other legal rights, for instance, the right to repossess, sell and apply security to the payments under this note and any other debts I may then owe you.

Irregular Payments You can accept late payments or partial payments, even though marked "payment in full", without losing any of your rights under this note.

Delay in Enforcement You can delay enforcing any of your rights under this note without losing them.

Collection Costs If I'm in default under this note and you demand full payment, I agree to pay you interest on the unpaid balance at the rate of 1% per month, after an allowance for the unearned **finance charge.** If you have to sue me, I also agree to pay your attorney's fees equal to 15% of the amount due, and court costs. But if I defend and the court decides I am right, I understand that you will pay my reasonable attorney's fees and the court costs.

Comakers If I'm signing this note as a comaker, I agree to be equally responsible with the borrower. You don't have to notify me that this note hasn't been paid. You can change the terms of payment and release any security without notifying or releasing me from responsibility on this note.

Copy Received The borrower acknowledges receipt of a completely filled-in copy of this note.

Signatures	Addresses
Borrower: ____________________	____________________
Comaker: ____________________	____________________
Comaker: ____________________	____________________
Comaker: ____________________	____________________

Hot Line If something should happen and you can't pay on time, please call us immediately at (212) 559-3061.

Personal Finance Department
First National City Bank

NEW CONSUMER LOAN NOTE

FNB 668 Rev. 1/75

APPENDIX (ii)